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No. 14,053

IN THE

United States Court of Appeals

For the Ninth Circuit

BRIGILDO RESURRECCION-TALavera,
Appellant,

VS.

BRUCE G. BARBER, Individually and as
District Director of Immigration
and Naturalization,
Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

INTRODUCTORY STATEMENT.

The action in which appellant has noticed appeal was commenced below on August 24, 1953 by the filing of a complaint entitled "Complaint for Injunction, Declaratory Relief, and a Review of Administrative Action." The prayer of the complaint asked for a review of the legality of the deportation order, a declaration of the rights of the parties and for temporary and permanent injunction against deportation. A motion to dismiss was filed by the defendant on the ground, among others, that the complaint did not state a claim upon which relief could be granted. The Court below by memorandum and order dated

September 18, 1953 (Tr. p. 11) granted the motion and dismissed the action. The facts as alleged in the complaint stand as undisputed insofar as this appeal is concerned.

Following the order dismissing the action, a 48-hour temporary restraining order during which to make an application to the Court of Appeals for a stay of deportation pending appeal was, on September 21, 1953, granted by the Court below (Tr. 17). The notice of appeal was filed on September 23, 1953. (Tr. 18.)

On October 7, 1953 this Court denied appellant's motion for stay of deportation pending appeal. He was thereafter taken into custody and placed aboard the SS PRESIDENT WILSON for transportation to the Philippine Islands. On October 14, 1953 said vessel departed San Francisco and proceeded to San Pedro, California. Appellant caused to be filed a petition for writ of habeas corpus which was entertained by Chief Judge Denman of this Court, and on October 15, 1953 an order to show cause issued. Appellant was removed from the SS PRESIDENT WILSON at San Pedro, California on October 16, 1953 and returned to the custody of appellee in San Francisco. Hearing on the order to show cause and petition was had on October 21, 1953. On October 22, 1953 Judge Denman filed an opinion and order denying the application (Appendix A) but stayed deportation pending decision by this Court upon an application for a stay pending appeal. Application for such a stay was made and denied. On November

29, 1953 appellant was deported to the Philippine Islands. He has not reentered the United States.

JURISDICTION.

Appellant in his complaint alleged jurisdiction of the District Court under 28 U.S.C. §§1331, 1346(a)(2) and §2201, and 5 U.S.C. §1009. In his brief appellant was concerned with the matter only to the extent of stating—"The jurisdiction of the court below is conferred by 28 U.S.C. §§ 1331, 1346(a)(2), 2201, and 5 U.S.C. 1009."

The immigration proceedings herein were commenced in August, 1952 under the provisions of the Immigration Act of 1917, §19 (8 U.S.C. 155). The order of deportation became final on July 31, 1953. The Immigration and Nationality Act of 1952 became effective December 24, 1952 (Sec. 155 of Title 8 is now contained in Sec. 1251 of Title 8).

Appellant by his complaint sought a judicial review of the order of deportation prior to being taken into custody. For this purpose he proceeded similarly to *Rubenstein v. Brownell*, 206 F. 2d 449. However, in reliance on *Rubenstein v. Brownell*, resort must be had to Sec. 242(c) of the 1952 Act (8 U.S.C. 1253(c)) for jurisdiction and then according to the Second Circuit, the imminent detention may be tested only by the principles that would be applicable in habeas corpus.

In view of the savings clause of the 1952 Act, Sec. 405 (8 U.S.C. 1105 note) and *Yanish v. Barber*, 211 F. 2d 467 (9th Cir.) appellant might well contend, if it served his advantage, that the 1952 Act is not applicable as to him in that the proceedings were instituted under the 1917 Act. In that event *Heikkila v. Barber*, 345 U.S. 229, and *Heikkila v. Barber*, No. 13988 of this Court, are controlling and habeas corpus provides the sole judicial remedy.

Following the denial of a stay of deportation by this Court pending the appeal, appellant filed a petition for habeas corpus to review the legality of the deportation order. Chief Judge Denman of this Court issued an order to show cause and heard the matter at length. His opinion denying the writ is set forth in full (Appendix A). On motion to this Court a stay of deportation was again denied on appeal and appellant was deported. The appeal in the habeas corpus action, No. 14118, was dismissed as moot. This appeal is likewise *moot*.

STATUTES INVOLVED.

8 U.S.C. 155. Deportation of undesirable Aliens Generally.

“(a) That any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral

turpitude; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * * . The provisions of this section, with the exceptions hereinbefore noted shall be applicable to the classes therein mentioned irrespective of the time of their entry into the United States; * * * .”

8 *U.S.C.* 1252

“(c) * * * the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien’s departure from the United States * * * .”

QUESTIONS PRESENTED.

Appellant designated the following points to be relied upon on appeal although the transcript of Record does not contain the designation.

1. “Appellant is not subject to deportation under the Immigration Act of 1917 because he was not an alien at the time of his conviction of a crime involving moral turpitude”;

2. “The Deportation Order is invalid and illegal in that it interprets the Immigration Act of 1917 as an ex post facto law forbidden by the Constitution of the United States.”

On page 10 of Appellant’s opening brief the following errors are specified:

“1. The Complaint states a cause of action”;

“2. Appellant is not an alien”;

“3. If Appellant is an alien he is not within the provisions of Section 19 of the 1917 Immigration Act since his conviction of a crime involving moral turpitude occurred while he was a national of the United States.”

Appellant has abandoned the second point in the designation of points and has substituted therefor the specification of error that he “is not an alien.” Upon this specification that “he is not an alien”, Appellant poses the following questions:

“1. Did Appellant become a citizen of the United States by birth in the Philippine Islands in 1910?”

“2. Did the Congress of the United States intend by the enactment of the Philippine Independence Act to apply the immigration and naturalization laws of the United States to Filipinos theretofore resident in the United States?”

“3. Did the grant of Philippine independence terminate appellant’s United States nationality?”

The third specification of error, the first designated point, and question 4 on page 2 of Appellant’s brief are the same.

Questions 5 and 6 relate to the review of a final Order of Deportation and of indispensable parties. As is shown on Page 16 of the transcript, these questions were not considered by the court below in dismissing the action.

ARGUMENT.**I.**

The following facts are alleged by appellant in his complaint.

Appellant was born in the Philippine Islands in 1910. He first came to the United States in March, 1934. In 1942 he was convicted of burglary in the first degree and served about two years in San Quentin. In 1952 he visited the town of Mexicali in Mexico and last returned to the United States in April, 1952. In August, 1952 he was arrested in an immigration deportation proceeding. On July 3, 1953 he was notified that the Board of Immigration Appeals had dismissed his appeal and that an order of deportation of February, 1953 had become final. He was ordered deported under the provisions of §19 of the Immigration Act of 1917 (8 U.S.C. 155). The material portion of which said statute provides:

“(a) * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude . . . shall upon the warrant of the Attorney General, be taken into custody and deported.”

The court below granted defendant's motion to dismiss on the ground that there is stated no cause for granting any relief (Tr. 11-16). Judge Carter held:

(1) Appellant was an alien at the time of his entry into the United States in April, 1952, having acquired that status on July 4, 1946.

Mangoang v. Boyd, (9th Cir.) 205 F. 2d 553;

Cabebe v. Acheson, (9th Cir.) 183 F. 2d 795;

Gonzales v. Barber, (9th. Cir.) 207 F. 2d 398;
Gancy v. United States, (8th Cir.) 149 F. 2d
 788.

(2) Appellant made an entry in 1952 when he returned to the United States from Mexico.

United States ex rel. Volpe v. Smith, 289 U.S.
 422;

Schoeps v. Carmichael, (9th Cir.) 177 F. 2d
 391 cert. den. 339 U.S. 914;

Del Guercio v. Gabot, (9th Cir.) 161 F. 2d 559.

(3) Appellant had been convicted of a felony involving moral turpitude prior to his entry in 1952. He was convicted of burglary in the first degree in 1942.

Matter of Coffee, 123 Cal. 522;

United States ex rel. Volpe v. Smith, 289 U.S.
 422;

Jordan v. De George, 341 U.S. 223;

United States v. Zimmerman, (DCED Pa.) 71
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(4) There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.

Eichenlaub v. Shaughnessy, 338 U.S. 521.

(5) Section 19 of the Immigration Act of 1917 is not unconstitutional as an ex post facto law.

Calder v. Brill, 3 Dall. 386—3 U.S. 386;

Johannessen v. United States, 225 U.S. 227;

Bugajewitz v. Adams, 228 U.S. 585;

Carlson v. Landon, 342 U.S. 524;

Mahler v. Eby, 264 U.S. 32;

Harisiades v. Shaughnessy, 342 U.S. 580.

As previously stated, Appellant filed a notice of appeal and sought from this Court a stay of deportation pending appeal. The stay was denied and deportation was commenced. A petition for a writ of habeas corpus was filed and entertained by Chief Judge Denman of this Court (District Court No. 33118). After hearing the matter fully, Judge Denman, by order dated October 22, 1953, denied Appellant's application. (Appendix A.)

Appellant's contention herein, that he was not subject to deportation under the Immigration Act of 1917 because he was not an alien at the time of his conviction of a crime involving moral turpitude was also made by Appellant in the petition for writ of habeas corpus, presented to Judge Denman. In his opinion, (Appendix A) Judge Denman stated:

“ * * * for the purpose of determining whether the applicant is excludable or deportable he was an alien when convicted in 1942 * * * .”

Section 8(a)(1) of the Philippine Independence Act of 1934, 48 Stat. 456 at 462, provides that:

“For the purposes of the Immigration Act of 1917 * * * and all other laws of the United States relating to immigration, exclusion, or *expulsion* of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as aliens.”

The above section was an issue in *Gonzales v. Barber*, reported at 207 F. 2d 398, affirmed 347 U.S. 637. Gonzales, a Filipino, had committed two crimes, one in 1941 and one in 1950. He claimed he was not deportable because at the time he committed the crimes he was not an alien. This Court held that Gonzales was properly subject to deportation under Sec. 19 of the Immigration Act of 1917 as an alien if otherwise subject to its terms. See also

Cabebe v. Acheson, (CA-9) 183 F. 2d 795;

Varleta v. Barber, (CA-9) 199 F. 2d 419.

A similar contention was made to the Supreme Court of the United States in *Eichenlaub v. Shaughnessy*, (supra). In that case Eichenlaub, who had become a naturalized citizen of the United States in 1936, was in 1941 convicted of a conspiracy to violate the Espionage Act of 1917. His naturalization was subsequently revoked and thereafter deportation was sought under the Act of May 10, 1920 (8 U.S.C. §157). The Court considered the 1920 Act and the 1917 Act as *in pari materia* and applied the definition of the 1917 Act to the word "alien". (See footnote 13, page 528.)

"The above words require that all persons to be deported under this Act shall be 'aliens'. They do not limit its scope to aliens who have never been naturalized. They do not exempt those who have secured certificates of naturalization, but then lost them by court order on the ground of fraud in their procurement. They do not suggest that such persons are not as clearly 'aliens' as they were before their fraudulent naturaliza-

tion. *There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.* That is what Congress did in the Act of 1920, and there was no occasion to restrict its language so as to narrow its plain meaning.” (Emphasis supplied.)

And at page 529:

“The one substantial issue is whether the Act requires that the relators not only must have been ‘aliens’ at the times when they were ordered deported, but that they must have also had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were ‘aliens’ when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators’ naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg v. United States*, 60 F. 2d 475 (CA 3rd Cir.) They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an *alien status when convicted* of the designated offenses.

“In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denaturalization orders. *A simpler and equally complete solution lies in the view that the Act does not require that the offenders*

reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders; including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offences are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied." (Emphasis ours.)

Appellant admits he made an entry from a foreign country in 1952 (See *U.S. ex rel. Volpe v. Smith*, 289 U.S. 422, 425) and admits that he was convicted of burglary in the first degree. It is submitted appellant was a deportable alien and he was so deported.

II.

Appellant has devoted the principal portion of his brief to the proposition that "appellant is not an alien." This proposition was not advanced either to the Court below in this matter or to Judge Denman in the hearing on the habeas corpus petition.

In the present posture of this case, if the proposition were seriously considered, the nature of the action would necessarily be changed from a judicial re-

view of the immigration proceedings to a declaratory judgment action no longer involving the local immigration director. The affirmative relief sought is against the head of the department of the government concerned. The action would be under 28 USC 2201 and should be against the Attorney General of the United States, and as he is only subject to jurisdiction in the District of Columbia, suit would have to be filed in the District of Columbia.

Blackmar v. Guerre, 342 U.S. 512;

Jew Sing v. Barber, 215 F. 2d 906 (9 Cir.);

Perkins v. Elg, 307 U.S. 325;

McGrath v. Kristensen, 340 U.S. 162.

On page 11 of the brief appellant states that it is his contention that he became a citizen of the United States by birth *but* that he “does not claim that he is a citizen in the sense that he is entitled to all of the political rights of which a citizen may be possessed.”

The President of the United States has the power “by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.” Const. Art. II, Sec. 2, Cl. 2.

The supreme law of the land consists of “This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, * * *”—Const. Art. VI, Cl. 2.

The Philippine Islands were ceded to the United States by the Treaty of Paris on December 10, 1898

(30 Stat. 1754) which provided in Article IX that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." By the Act of July 1, 1902 (32 Stats. 691-692), Congress declared that all inhabitants of the Philippine Islands continuing to reside there who were Spanish subjects on April 11, 1899, and their children subsequently born, shall "be citizens of the Philippine Islands and as such entitled to the protection of the United States * * *." In 1916 in Section 2 of the Jones Act (39 Stat. 545, 546) this provision of the 1902 Act governing the political status of the inhabitants of the Philippine Islands was repeated. In contrast with the Act of March 2, 1917 (39 Stat. 951, 953) which declared the inhabitants of Puerto Rico to be citizens of the United States, no act of Congress has ever declared the citizens or inhabitants of the Philippine Islands to be citizens or inhabitants of the United States. Since the Philippine Islands were at no time incorporated into the United States, persons born in the Philippine Islands have not acquired United States citizenship by birth pursuant to the Fourteenth Amendment. *Cabebe v. Acheson*, (supra); *Gancy v. U.S.* (supra); *Mangoang v. Boyd*, (supra); *Gonzales v. Barber* (supra); *Del Guercio v. Gabot*, *Varleta v. Barber*, (supra); *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 674-675; *People v. Cordero*, 50 Cal. App. 2d 146; Cf. *Elk v. Wilkins*, 112 U.S. 94; Burdick, *Law of the American Constitution* (1922) pp. 327-328. Thus, the inhabitants of the Philippine

Islands, while admittedly not citizens of the United States, were entitled to the "protection of the United States" and owed "permanent allegiance" to the United States. This status became known as that of a "national" as distinguished from a "citizen" or a "non-citizen national." It was terminated for all purposes on July 4, 1946 when the Philippine Islands became an independent sovereignty. The distinction between "national" and "citizen" was written into Section 101 of the Nationality Act of 1940 (54 Stat. 1137, 8 U.S.C. 501).

CONCLUSION.

Appellee submits that the appeal herein is moot in that appellant has been deported to the Philippine Islands.

The attempt of appellant to convert the action from a judicial review of a final order of deportation into a declaratory judgment action under T. 28 U.S.C. § 2201 of the United States Code must fail for want of an indispensable party, the Attorney General of the United States or the Commissioner of Immigration. Appellant's contention that he is in a semi-status of citizenship by virtue of his birth in the Philippine Islands during the time that the United States of America asserted sovereign authority thereover is wholly unfounded. The Court below did not err in dismissing the action for failure to state a

claim upon which relief can be granted and the appeal should be dismissed as moot.

Dated: San Francisco, California,
February 17, 1955.

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(Appendix Follows.)

Appendix.

Appendix A

Original Filed Oct. 22, 1953.

Clerk, U.S. Dist. Court
San Francisco.

*United States Court of Appeals
Ninth Circuit*

Before William Denman, Chief Judge

In the Matter of the Petition of
Brigildo Resurreccion-Talavera
for a Writ of Habeas Corpus.

} No. 33,118

DENMAN, Chief Judge:

Applicant, a national and citizen of the Philippine Republic, seeks from me, as Chief Judge, a writ of habeas corpus to free him from the custody of Bruce G. Barber, District Director, Immigration and Naturalization Service, who holds the applicant for the purpose of deporting him from the United States to that Republic pursuant to a duly issued order of deportation.

The application alleges that the applicant in 1942 was convicted in the Superior Court in and for the County of Monterey, State of California, of the crime of burglary in the first degree. He served a term of approximately two years in the California State Pris-

on at San Quentin. The application further alleges that in 1952, applicant voluntarily made several short trips over the Mexican border, returning to this country each time.

When applicant was convicted in 1942, it was the law that, because of the conviction, if he left the United States he could be excluded from re-entering, and that if he re-entered he could be deported. This law was established by the Immigration Act of 1917 and the Philippine Independence Act of 1934. The Philippine Independence Act of 1934, 48 Stat. 456, provides that: "For the purposes of the Immigration Act of 1917 . . . and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as aliens." § 8(a)(1), 48 Stat. at 462. Hence, for the purpose of determining whether the applicant is excludable or deportable, he was an alien when convicted in 1942. Among the classes of deportable aliens under the Immigration Act of 1917 is one who "at the time of entry was within one or more of the classes of aliens excludable by law at the time of entry." Former 8 U.S.C. § 155(a), now substantially re-enacted in 8 U.S.C. § 1251(a)(1). The classes of deportable aliens under that Act included those "who have been convicted of a crime involving moral turpitude . . ." prior to entry. A return by an alien from a voluntary trip to a foreign country, no matter how short the trip, is an entry. *Schoeps v. Carmichael*, 177 F. 2d 391 (Cir. 9). Being excludable

at the time of his re-entry, applicant is now properly held for deportation.

There is no merit to the contention of the applicant that his deportation is an ex post facto law addition to the penalty for the commission of the crime of burglary. The law as established by Congress prior to the commission of the crime contemplated that its commission could be the cause of exclusion or deportation.

The application is denied. The deportation order is stayed pending a decision by the Court of Appeals for the Ninth Circuit upon an application for a stay pending appeal in the within cause, provided such application is filed with the Court of Appeals within ten days after the date of this order.

William Denman,
Chief Judge.

